In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-378

CLIFFORD HERSH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioner was charged in the United States District Court for the Northern District of California with two counts of unlawful sale of dangerous drugs —lysergic acid diethylamide (LSD)—in violation of former 21 U.S.C. 331(q)(2) (1964 ed., Supp. V) and with conspiracy in violation of 18 U.S.C. 371. Following a retrial by jury,[1] petitioner was convicted on the conspiracy count only, and was sentenced to an in-

[1] Petitioner's first trial ended with a jury disagreement.

determinate term of imprisonment pursuant to the provisions of 18 U.S.C. 4209. The court of appeals affirmed *per curiam* (Pet. App. A).

The relevant facts are not in dispute and are set forth fully in the opinion below. They show that on March 6, 1969, the Napa County Sheriff's Office was called by a repairman who had been hired by the owner of a house to repair its roof (M. Tr. 21-22).[2] The repairman reported that he suspected that the tenants were operating an illegal laboratory in the house, since he had observed what he thought to be laboratory apparatus inside (M. Tr. 29). He indicated that his suspicions had been further aroused by the fact that the windows of the house were covered with sheets and blankets (M. Tr. 48-50). Two detectives visited the house that day, knocked on the front door several times, but received no answer (Tr. 52). Beside the front door was a window, which had two or three inches uncovered (M. Tr. 23-24, 47; Tr. 53, 78). Looking through the window, the officers observed laboratory apparatus, including beakers, oxygen tanks and white powder strewn on the floor (M. Tr. 25, 29, 46; Tr. 53, 78). The officers then interviewed Victor Milhouse, a neighbor (M. Tr. 30-34; Tr. 54). Milhouse informed them that he had observed people arriving and departing the house at odd hours and produced a log detailing these movements (M. Tr. 30-31). Milhouse also gave the of-

[2] "Tr." and "M. Tr." refer respectively to the trial transcript and the transcript of the pre-trial hearing on petitioner's motion to suppress the evidence.

ficers a list of chemicals which he had seen being brought into the house (M. Tr. 33; Tr. 54).

The following day the police received a call from Mrs. Milhouse, stating that the occupants of the house were apparently packing their car and preparing to leave (M. Tr. 37-38; Tr. 58). The officers who arrived at the scene saw laboratory equipment being moved, and smoke coming from the chimney (M. Tr. 38-39; Tr. 59). They radioed for assistance, but before additional officers could arrive, the people in the house started to leave (M. Tr. 39; Tr. 59). The officers stopped the cars and placed the occupants, including petitioner, under arrest (M. Tr. 40; Tr. 59-60). The car in which petitioner was riding was searched and found to contain a quantity of phencyclidine (M. Tr. 40-41; Tr. 68-71).

Prior to each trial, petitioner moved to suppress the items seized as a result of his arrest. Following evidentiary hearings, these motions were denied by two district judges. The trial judge here, in denying the motion prior to the retrial, found that on the basis of the investigation, including the challenged view through the window, the officers had probable cause to arrest petitioner (Tr. 26). The court of appeals affirmed, noting in addition that the officers had sufficient evidence independent of the claimed illegal search to arrest petitioner (Pet. App. A iv-vi).

2. Petitioner contends that the viewing of the laboratory apparatus through the window constituted an unlawful search which tainted all that followed, including his arrest and the related seizures. The

claim is without merit. The officers were lawfully present when they looked through the uncovered portion of the window; they had arrived at the house in daytime through a means of access open to the general public and for the proper purpose of investigating information supplied by a private citizen. See *Harris* v. *United States*, 390 U.S. 234, 236.[3] The fact that the officers peered through the uncovered area of the front window did not convert their actions into an illegal search, since petitioner had no reasonable expectation that persons coming to his front door would not look through the uncovered portion of the adjacent window when they received no response to their knocking. Cf. *Katz* v. *United States*, 389 U.S. 347, 351-352.[4]

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[3] Petitioner contends the house was enclosed with a fence, clearly posted with "no trespassing" signs. However, this factual question was decided adversely to petitioner by the courts below (Pet. App. A iii).

[4] *California* v. *Krivda*, No. 71-651, certiorari granted, 405 U.S. 1039, relied on by petitioner (Pet. 9-10), is not in point. The issue there is wholly different: whether the seizure by police of material in a garbage can left for pickup outside the home violated the homeowner's reasonable expectation of privacy. Nor are *Texas* v. *Gonzales*, 388 F. 2d 145 (C.A. 5), and *Brock* v. *United States*, 223 F. 2d 681 (C.A. 5), relied on by petitioner (Pet. 10), in conflict with the holding here. Although in those cases the Fifth Circuit held that peering through windows of a home constituted an unreasonable search and seizure, the facts in both cases show that the officers went around to the side of the house, where there is a greater expectation of privacy, and peered through bedroom and side windows.

In any event, as the court below found, there was ample evidence independent of the view through the window which justified the arrest (Pet. App. A v). Once the officers were unable to reach anyone at the house identified by the repairman, the reasonable course, whether or not they had seen anything through the window, was to seek information from the neighbors. The evidence thus discovered, together with the information supplied by the repairman, amply justified the subsequent arrest to prevent the imminent departure of the suspects; the search of the automobile incident to that arrest was therefore lawful. See *Draper* v. *United States*, 358 U.S. 307, and *Carroll* v. *United States*, 267 U.S. 132.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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